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IN THE

Supreme Court of the United States

October Term, 1975

No. .....

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Trans World Airlines, Inc. ("TWA"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 7, 1975.

Opinions Below

The opinion of the court of appeals is reported at 515 F.2d 173 and appears in the annexed Appendix at p. A-3 *et seq.* The opinion of the United States District Court for the Southern District of New York is not officially reported but is unofficially reported at CCH 1974-1 Trade Cas. ¶74,889 and appears in the annexed Appendix at p. A-1 *et seq.*

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 7, 1975. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 25, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

May a court of appeals, in reviewing an award of $1,015,625 in costs to prevailing defendants for expenses in providing security in lieu of a supersedeas bond, substitute its judgment as to the proper exercise of discretion for that of the district court and allow still further costs of $683,825.40 for additional items of expense in providing such security which had been expressly disallowed by the district court on the ground that they were unnecessary and were voluntarily incurred by defendants?

Rules Involved

Fed. R. App. P. 39(a):

> "(a) To Whom Allowed. Except as otherwise provided by law, • • • if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; • • •."

Fed. R. App. P. 39(e):

> "(e) Costs on Appeal Taxable in the District Courts. • • • the premiums paid for costs of supersedeas bonds or other bonds to preserve rights pending appeal • • • shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule."

Statement of the Case

This petition is the epilogue to an action twice previously before this Court (380 U.S. 248; 409 U.S. 363), and characterized by Mr. Chief Justice Burger as "a 20th-century sequel to Bleak House" (409 U.S. at 393). The final issue presented is whether TWA, the unsuccessful plaintiff which has already paid the defendants $1,272,413.76 in costs,* must now pay additional costs of $653,805.40. Such additional costs were disallowed by the district court after a hearing, but the court of appeals reversed, one judge dissenting as to all but a minor part thereof. This petition seeks review of that court of appeals judgment.

1. *Summary history of the action*

The complaint was filed in the Southern District of New York on June 30, 1961. The legal issues that proved ultimately dispositive of the action were first raised on August 9, 1961 when Hughes Tool Company** filed its motion to dismiss and for summary judgment, asserting that (1) the antitrust violations alleged in the complaint were within the exclusive jurisdiction of the Civil Aeronautics Board (the "CAB") and (2) the conduct alleged in the complaint was immune from the antitrust laws because approved by the CAB. Toolco elected, however, not to bring that motion on for decision.

On August 31, 1961 the action was assigned "for all purposes" to Judge Charles M. Metzner, who has presided

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* This total includes $257,844.76 of costs not related to the provision of security for a stay, which TWA does not dispute.

** Respondent Hughes Tool Company changed its name to Summa Corporation late in 1972, but here, as in the past, we will refer to it as "Toolco" and to respondents Toolco and Holliday collectively as "defendants."

over all proceedings in the action in the district court since that date. After defendants had consumed an entire year with depositions of TWA, the district court on January 9, 1963 ruled that TWA and the additional defendants could commence their own discovery with the deposition of Hughes, Toolco's sole stockholder who had never been served in the action, beginning on February 11, 1963. After this firm date for Hughes's deposition was fixed, Toolco on February 1, 1963 brought on for determination the motion to dismiss it had orginally filed in August 1961. On February 6 the district court denied the motion, filing its opinion the next day (214 F.Supp. 106). On February 8, the last business day before the deposition was to begin, Toolco informed the district court and the other parties that Hughes would not appear. As a result of that refusal to proceed with the Hughes deposition and Toolco's refusal to obey other discovery orders, the district court on May 3, 1963 entered a default judgment in TWA's favor (32 F.R.D. 604).

An interlocutory appeal by the defendants pursuant to 28 U.S.C. §1292(b) resulted in an affirmance by the court of appeals (332 F.2d 602). This Court granted certiorari (379 U.S. 912) but on May 8, 1965, after full briefing and oral argument, dismissed the writ as improvidently granted (380 U.S. 248).

Upon remand, after an extensive damage hearing before Special Master Herbert Brownell, Judge Metzner confirmed the Special Master's report (308 F.Supp. 679) and on April 14, 1970 entered a judgment for TWA of $145,448,-141.07 (312 F.Supp. 478). That judgment was affirmed by the court of appeals (449 F.2d 51), but on January 10, 1973, this Court reversed and remanded, with directions to dismiss the complaint (409 U.S. 363). The grounds for that

decision were those originally raised by Toolco's 1961 motion to dismiss.

One consequence of this Court's decision was the taxation of costs against TWA in favor of the prevailing defendants. There have been taxed against and paid by TWA costs in this Court of $16,847.24, costs in the court of appeals of $71,521.42, and costs in the district court of $1,184,045.10, including $1,015,625 for interest paid on a letter of credit, which was filed by defendants as security in lieu of a supersedeas bond. While various of these costs were contested by TWA below, none is contested here.

What is contested is $683,805.40 of additional costs, disallowed by the district court but allowed by the court of appeals, for additional items of expense incurred by defendants under terms of the district court's 1970 order permitting them to appeal without posting an ordinary supersedeas bond. That contested amount is made up of $617,765 for charges for special quarterly audits by Toolco's auditors during the period within which security in lieu of a supersedeas bond was posted, and $66,040.40 for charges incurred purportedly in connection with Toolco's collateralizing its $75 million letter of credit from Bank of America.

2. *Proceedings leading up to the stay*

Following entry of judgment for TWA on April 14, 1970, in the amount of $145,448,141.07 plus interest, defendants moved by order to show cause for a stay of execution pending appeal either without security or, alternatively, secured by a lien on specific property in lieu of a normal supersedeas bond (5a-6a).* Hearings on de-

* References to "....-a" are to pages of the Appendix filed with the court of appeals.

fendants' motion were held before the district court on May 11, May 20 and June 3 (19a-70a).* At those hearings TWA argued that it was entitled to the full protection normally afforded to a successful litigant when execution is stayed pending appeal, but that if a bond in the full amount of the judgment were not to be provided, then TWA was entitled to some other form of undertaking, binding on Hughes personally, which would guarantee the ultimate collectibility of the judgment. TWA pointed out that Hughes was personally outside the jurisdiction of the federal courts, and that he had both the absolute power to cause Toolco to take any action which he desired with respect to its assets and the habit of taking major actions in absolute secrecy. TWA suggested such alternatives as the hypothecation by Hughes of his stock in Toolco as security for the judgment, a personal undertaking by Hughes to the court that the judgment would be paid, and a reasonable restriction on Toolco's payment of dividends to Hughes, its sole stockholder (22a-25a, 30a, 51a-52a, 54a-55a, 63a-64a; Transcript of the Hearing of June 3, 1970, pp. 8-11, 22). None of these steps would have involved any significant expense, either to Toolco or to Hughes. Toolco's position, however, as the district court itself stated (80a; *see also* 202a), was that it should be permitted, without providing a bond in any amount, "to conduct business as usual," an enterprise which, at that time, apparently included converting its cash and other high-liquidity assets into fixed assets (71a-72a, 80a). In place of the guaranty sought by TWA, Toolco volunteered to provide quarterly audit reports from its outside

* The transcript of the June 3, 1970 hearing was placed under seal by the district court at Toolco's request and was not reproduced in the printed appendix filed with the court of appeals. Four copies of the transcript, under seal, were filed by Toolco with the clerk of the court of appeals pursuant to that court's order.

auditors, Haskins & Sells (Transcript of Hearing of June 3, 1970, p. 23). Haskins & Sells made such audits annually in any event; Toolco's proposal was for additional audits to be made at the end of the first, second and third quarters in each year. It is the expense of these additional audits that has been charged to TWA.

TWA protested that it desired either actual security or some affirmative order or undertaking that would be effective against a possible move by Hughes to strip Toolco of its assets. As to quarterly financial statements, while TWA welcomed them, it expressly stated that they need not be certified by outside auditors—certification by responsible Toolco financial officers would be adequate (28a; Doc. 16, p. 4*).

On June 10, 1970 the district court entered an opinion and order directing defendants to post security in the amount of $75 million, with the balance of the judgment to be secured by Toolco's maintaining its net worth at three times the amount of such balance (81a). After further hearings were held on the form and nature of security to be provided by defendants (82a-85a, 94a-103a), the district court entered orders dated June 16, 1970 (86a-91a) and June 25, 1970 (104a-107a), approving the final form of security, including provision for certified quarterly audit reports as proposed by Toolco, and substitution of a letter of credit in the amount of $75 million in lieu of a supersedeas bond.

3. *Taxation of costs*

After this Court's January 1973 decision, a judgment dismissing TWA's complaint was entered by the district

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* References to "Doc. 16" are to part of the original record on appeal which was not reproduced in the printed appendix before the court of appeals. Copies, however, were provided to the court of appeals upon the oral argument.

court on May 23, 1973 (359 F.Supp. 783, 112a). Defendants filed a verified bill of costs on September 17, 1973 (113a-114a), and, after proceedings before him, the clerk of the district court entered a judgment for costs of $1,941,639.15 against TWA on October 16, 1973 (115a).

TWA moved before the district court for retaxation of costs on October 17, 1973 (116a-169a), and that motion was argued on November 15, 1973 (186a-200a). In an opinion and order dated January 10, 1974 (201a-202a), the court confirmed the clerk's allowance of $173,022.75 for costs at the district court level (202a) and granted TWA a setoff of $4,602.65 in costs for deposition expenses incurred when Hughes's deposition was precipitously cancelled. The district court also confirmed the Clerk's award of $1,015,625 in costs for interest charges paid by defendants to Bank of America for issuing the $75 million letter of credit, reasoning that that "charge is similar to the premium paid for a supersedeas bond" (201a). The district court disallowed the amounts taxed by the Clerk for quarterly audit charges and for charges for collateralizing the letter of credit (201a-202a).

The court of appeals reversed as to both items. The two-judge majority said of the auditing charges:

> "In our view the costs of the audits under the consent order were costs in lieu of providing a supersedeas bond as provided by the rules. Just as the court allowed the one-half of one per cent premium on the letter of credit, so too it should have allowed the costs for the audits. To be sure, this was a price of doing business as usual, but that is true in the case of any supersedeas bond on appeal. We fail to see how the court's wise exercise of its discretion in an unusual case not to require security by way of a bond may be used to justify the disallowance of the costs of procur-

ing alternate security for the appeal." (A-9, 515 F.2d at 177; footnote omitted)

Dissenting from this view, Judge Timbers argued that the majority's ruling on the audit charges "• • • results in placing the imprimatur of this Court on permitting a party called upon to bond a judgment to conduct business as usual pending appeal and then to saddle his opponent with the expenses of doing so—in the teeth of an express finding by the district court that such expenses were unnecessarily costly, clearly avoidable and therefore not properly chargeable as taxable costs" (A-15-16, 515 F.2d at 180).

The court of appeals also reversed Judge Metzner's disallowance of the $66,040.40 of expenses incurred by Toolco in obtaining the letter of credit, apparently because the issuing bank had made it a condition precedent that the letter of credit be secured (A-11, 515 F.2d at 178-79).

Reasons for Granting the Writ

This Court is only rarely called upon to consider the taxation of costs by district courts, in part, of course, because typically the amounts involved are small. It has, however, laid down two important principles, both of which have been ignored by the court of appeals.

First, in *Newton* v. *Consolidated Gas Co.*, 265 U.S. 78 (1924), the Court stated that, except where there is a question as to the court's legal power to award costs, the allowance of costs to a successful litigant should be left to "the discretion vested in the trial court." (265 U.S. at 83)

Second, in *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227 (1964), which also reaffirmed this principle (at 231-33), a further guideline was added:

> "Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be." (379 U.S. at 235)

We submit that the *Farmer* rule precludes allowance of any cost, even if apparently proper, which is shown to have been voluntarily and unnecessarily incurred.

1. *The court of appeals has improperly substituted its discretion for that of the trial court*

As Judge Timbers suggests in his dissenting opinion, prior to the decision in this case it had seemed to courts, commentators and litigants alike that "[t]here are few areas where • • • it was more axiomatic that the exercise of discretion by a trial judge should not be disturbed absent the clearest showing of abuse than in the taxation of costs" (A-12, 515 F.2d at 179). Without unnecessary multiplication of authorities, it is evident that this has been the universal view. *See, e.g., Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 235-36 (1964); *McDonnell* v. *American Leduc Petroleums, Ltd.*, 456 F.2d 1170, 1188 (2d Cir. 1972); *Oscar Gruss & Son* v. *Lumbermens Mutual Casualty Co.*, 422 F.2d 1278, 1284-85 (2d Cir. 1970); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §2688 (1973). As this court explained in *Newton* v. *Consolidated Gas Co., supra*, the reason discretion in such matters is vested in the trial court is "the better opportunity of that court to exercise [its] discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case." (265 U.S. at 83.)

The court of appeals has departed from these principles, and has done so in a singularly inappropriate case.

Judge Metzner has presided over every proceeding in the district court in this action since August 1961. His decision to permit defendants a stay pending appeal on a different kind of security than an ordinary supersedeas bond—security which offered TWA substantially less assurance than a supersedeas bond that its judgment would be paid—followed months of briefing, hearings and intensive consideration. The decision was, indeed, characterized even by the court of appeals majority as a "wise exercise of [the district court's] discretion in an unusual case" (A-9, 515 F.2d at 177).

Nonetheless, that majority saw fit to substitute its judgment for that of the same trial judge in deciding which of the expenses incurred pursuant to his order were properly taxable against the losing party.

There is no suggestion in the majority's opinion, despite its citation of Fed. R. App. P. 39(a) and (e), that the result it reached was compelled by that Rule. The ground for the majority's opinion seems instead to have been that "[t]he district court sets forth no criteria for the disallowance of this item of costs" (A-10, 515 F.2d at 178). Yet as Judge Timbers urged in dissent:

> "* * * the record demonstrates with abundant clarity that the judge's action represents a classic exercise of sound discretion by a thoroughly experienced trial judge in the context of exceedingly complex litigation with which he has lived for a decade and a half." (A-13, 515 F.2d at 179)

That record shows clearly that the quarterly audit reports were volunteered* by defendants as an alternative

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* Indeed, defendants' counsel so stated to the district court at the hearing on June 3, 1970 (p. 23).

to the positive protection which TWA was seeking against activities by Hughes, over whom the court had no jurisdiction and who had in the past proven distinctly unavailable to lawful process of the court. TWA repeatedly urged some form of undertaking which would have been binding upon Hughes and would have guaranteed the ultimate collectibility of the judgment. TWA's position was not based upon any doubt as to the ability of Toolco at that time to pay the judgment, but rather upon the perceived need of some protection against actions by the elusive Mr. Hughes that would substantially impair that ability—a perception in which the district court concurred (Transcript of Hearing of June 3, 1970, p. 14). Since defendants could have provided this protection at little or no cost in the ways suggested by TWA at the time, it was surely within the discretion of the district court to disallow taxation against TWA of the cost of proceeding in a manner suggested by defendants as more convenient to them. As the district court held, the audits

> "* * * were accepted by the court at the request of the defendant as a less drastic but more costly form of protection of the judgment recovered by the plaintiff. It is perfectly clear from the proceedings in the spring of 1970 that Toolco was most interested in conducting business as usual. 314 F.Supp. 94 (S.D.N.Y. 1970). Since the defendant needed and was using millions of dollars to buy a hotel and an airline, and making alterations to hotels at the time it was called on to bond the judgment, it should bear the cost of allowing business to go on as usual." (A-2, 201a-202a).*

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* Discretionary denial in a proper case of additional expenses incurred in connection with securing a stay pending appeal is fully supported by the applicable precedents. Thus in *Aegean (Shipbrokers) Ltd.* v. *Henriksen's Rederi A/S*, 165 F.Supp. 939 (D.Mass. 1958), the prevailing party sought interest on cash col-

As for the $66,040.40 taxed by the court of appeals for a title search, a county clerk's filing fee and additional fees paid to the Bank of America under the letter of credit arrangement, defendants made no showing that these charges were reasonable and necessary. The letter of credit documents reveal that the security interests created in favor of the Bank were also security for "any other obligations" of Toolco to the Bank (165a)—hardly matters to be charged against TWA. Nor were such charges disclosed at the time the district court approved defendants' security arrangements. Unlike the stand-by interest charges on the $75 million provided under the letter of credit, which were within the contemplation of TWA as a potential taxable cost should defendants prevail on appeal, undisclosed underlying charges are properly part of the private arrangement between defendants and the Bank.

2. *The court of appeals has directed the allowance of entirely unnecessary expenses as taxable costs*

We are not aware of any action in the history of American jurisprudence in which costs have been taxed in an amount remotely comparable to the amount taxed in this case by the district court and already paid by TWA. Yet the court of appeals judgment directs that this already huge sum should be further grossly inflated by the inclusion

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lateral supplied in connection with a bond premium. The district court refused to award the interest, stating:

> "[T]he rule requires a showing of reasonableness [of the expenditure]. There is nothing to indicate respondent could not have deposited with the surety interest-bearing securities, or savings-bank books. It is not reasonable to charge petitioner for avoidable consequences." (165 F.Supp. at 940)

Accord: American Hawaiian Ventures, Inc. v. *M.V.J. Latuharhary*, 257 F.Supp. 622, 631 (D.N.J. 1966); *Keystone Shipping Co.* v. *S S Monfiore*, 275 F.Supp. 606, 607 (S.D. Tex. 1967), *aff'd*, 409 F.2d 1345 (5th Cir. 1969).

of fees paid by Toolco to its outside auditors which the record demonstrates to have been entirely unnecessary.

As we have shown above, the provision of annual and quarterly financial statements by TWA was *volunteered* by the defendants in lieu of providing any effective undertaking against the dispersion of Toolco's assets at Hughes's suggestion. The record also demonstrates that the further provision that the quarterly financial statements would be based on an independent audit and certified by Toolco's outside auditors was entirely Toolco's idea and never requested by TWA.

Indeed on at least two separate occasions TWA stated to the district court that the financial statements which it desired were those which would be readily available—the regular annual audit, certified by Haskins & Sells, and quarterly financial statements prepared and certified by Toolco's own financial officers.

The subject first came up in open court on May 11, 1970, and TWA suggested that it should receive financial statements comparable to those which a lending institution would expect in connection with a substantial loan, "certified at least annually by an outside auditing firm and at least quarterly by responsible financial authorities of the defendant." (28a)

Next, following defendants' proposal for quarterly audit reports, TWA on June 2, 1970 filed a memorandum and proposed order incorporating its views as to the financial statements. It suggested that the initial report should be certified so that TWA and the court would have accurate information on the existing situation. It went on to say, however:

> "Thereafter, quarterly reports, as opposed to annual reports, can be certified by Toolco's principal financial

officer as long as they are prepared on a basis consistent with the annual reports certified by Haskins & Sells." (Doc. 16, p. 4)

In the light of this clear record that TWA never sought to require Toolco to engage on this unnecessarily expensive course of conduct, for the court of appeals to require TWA to bear the expense of Toolco's quarterly audits is completely contrary to the principles laid down by this Court in *Farmer* v. *Arabian American Oil Co., supra.* The opinion of the majority below appears to proceed upon the principle that any expenditure by the prevailing party should be taxable if there is a rule or statute under which such a cost could rationally be allowed. Thus, the majority reasons, since the cost of a supersedeas bond would normally be taxable, the cost of everything furnished by defendants in lieu of a supersedeas bond should be taxable. It does not even comment on the fact that the fees paid to Haskins & Sells were strictly the result of the defendants' own proposal that the quarterly financial statements be verified by an independent audit, a requirement which was never asked for by the plaintiff.

This is far from giving defendants' costs claim the "careful scrutiny" which this Court said in *Farmer* costs proposed by winning parties should always be given. Indeed, when costs already taxed by the district court in the amount of $1,184,045.10 are increased by over $600,000 for such items, the court is clearly moving close to the situation warned against in *Farmer,* in which systems of jurisprudence other than our own deliberately "allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be." (379 U.S. at 235.)

CONCLUSION

Because so very few written opinions deal with the standards applicable to taxation of costs, this decision is likely to have impact far beyond this particular case. We submit that, unless the salutary twin principles that unnecessary costs should be disallowed and that allowance of costs should be left to the district court's discretion are to be broadly eroded in the future, this Court should grant certiorari and reverse.

Respectfully submitted,

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